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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1239

JACKSON COUNTY PUBLIC WATER SUPPLY DISTRICT No. 1,
Petitioner,

vs.

ONG AIRCRAFT CORPORATION, CITY OF KANSAS CITY, MISSOURI, ILUS W, DAVIS, Successor to H. Roe Bartle, Mayor of Kansas City, Missouri, HUGH G. CARR, Director of Water, Kansas City, Missouri, and EARL BROSNAHAN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI

INTRODUCTION

Respondents contend that the judgments of the State courts are correct and that certiorari should be denied.

JURISDICTION

Title 28, U.S.C.A., Section 1257(3), is supplemented by Supreme Court Rule 19(a) and Supreme Court Rule 23 (f). Respondents deny that this Court has jurisdiction, because no Federal question was decided by the State court, and no Federal questions were presented by Petitioner in the State courts.

QUESTIONS PRESENTED

Respondents deny that the questions suggested by Petitioner were before the State courts. The only questions presented in the State courts were whether Chapter 247, Revised Statutes of Missouri 1959, granted to the Water District an exclusive and monopolistic right to sell water within its district and whether the City of Kansas City granted such exclusive right by the terms of a certain contract dated July 7, 1961, entered into by Jackson County Public Water Supply District No. 1 and the City of Kansas City (Exhibit 1, R 23, 24).

Respondents deny that any question respecting constitutional rights of a federally financed public water district was presented or considered in the State courts, and consequently such question is not here for consideration by this Court.

LACK OF CONSTITUTIONAL PROVISIONS INVOLVED

Respondents deny that any U. S. constitutional provisions are involved because none was pleaded or presented in the State courts, and consequently none is involved for consideration by this Court.

RESPONDENTS' STATEMENT

Petitioner's Statement contains so many immaterial observations by Petitioner and is so completely interspersed with argument and misstatements instead of being confined to a concise statement of the case, containing the facts material to the consideration of the questions presented, that Respondents feel compelled to reject Petitioner's Statement and offer for the Court's consideration the following Statement:

In October, 1962, the Respondent, Ong Aircraft Corporation (hereinafter referred to as Developer), platted a tract of land containing 98.4 acres in Jackson County, Missouri, for residential development known as Crossgates Subdivision. The total platted lots were 372 in number, of which number 195 lots lay within the corporate limits of Kansas City, Missouri (hereinafter referred to as City) and the remaining 177 lots, comprising 41.59 acres, lay within the geographical area of Petitioner, Jackson County Public Water Supply District No. 1 (hereinafter sometimes referred to as District and sometimes referred to as Petitioner). On October 18, 1962, the Developer entered into a written contract with the City (Exhibit 14, R 81, 85) wherein the Developer agreed to construct at the Developer's own cost and expense and in accordance with the required specifications of the Water Director of the City, water mains, water lines, conduits and fire hydrants throughout the entire Crossgate Subdivision for the future furnishing of water by the City to future property owners and prospective residents of the subdivision.

In December, 1962, the District filed an injunction suit in the Circuit Court of Jackson County, Missouri, in which

suit the District sought to enjoin both the completion of the construction of the water lines and the carrying out of the contract of October 18, 1962, between the City and the Developer. Only 177 lots lying within the geographical area of the District are involved in this litigation. The District asserted in both the trial court and the appellate courts that the District had an exclusive and monopolistic right to furnish water to future consumers within the geographical area of the District for two alleged reasons; (1) that a contract between the District and the City made July 7, 1961 (Exhibit 1, R 23, 24) granted the District that exclusive right and (2) that such alleged exclusive right was granted the District by the terms of the Missouri State Statutes which created the District, being generally Chapter 247, Revised Statutes of Missouri, 1959.

The District's temporary injunction was dissolved by the trial court on April 9, 1963 (R 324, 325, 326) and on August 14, 1963, the trial court entered judgment denying District's petition for permanent injunction (R 362, 363) (Appendix B to petition herein.)

District's appeal to the Missouri Supreme Court was transferred by the Missouri Supreme Court for lack of jurisdiction to the Kansas City Court of Appeals (388 S.W.2d 893), which latter court affirmed the judgment of the trial court on October 3, 1966 and on December 5, 1966, denied District's Motion for Rehearing or in the Alternative to Transfer to the Supreme Court, the opinion of the Kansas City Court of Appeals being reported in 409 S.W.2d 222 (Appendices A and C to petition herein). Thereafter, on January 4, 1967, the District filed in the Supreme Court of Missouri District's Application to the Supreme Court for Order to Court of Appeals to Transfer the cause to the Supreme Court for Review, alleging in its application that the opinion of the Kansas City Court of Appeals was in con-

flict with other Missouri Appellate Court opinions (Appendix D to petition herein). District's application was by the Missouri Supreme Court denied on January 9, 1967. Thereafter, District filed its Motion for Leave to File Motion for Rehearing and Reconsideration of the Court's Order Denying District's Application to Transfer this case from the Kansas City Court of Appeals, again alleging conflict of the opinion of the Kansas City Court of Appeals with other Missouri Appellate Court opinions. This Motion for Leave filed by the District was denied by the Supreme Court of Missouri on January 20, 1967 (Appendix F to petition herein). At no time in the State proceedings was any claim made by the Petitioner that there was any violation of U. S. constitutional rights, or that any Federal statute or any Federal question was in issue.

Thereafter the District filed in this Court its Petition for Writ of Certiorari which petition is now before this Court for consideration.

REASONS FOR DENYING THE WRIT

Petitioner's Petition for Writ of Certiorari should be denied for the following reasons:

1. No Federal question was raised or presented in the State courts.

2. No U. S. constitutional question was presented in the State courts.

3. Petitioner's belated attempt to raise Federal questions by incorporating same in its petition for certiorari comes too late.

4. Alleged conflict between State courts' decisions does not constitute grounds for certiorari where no Federal questions are involved.

5. Petitioner had at all times full opportunity to raise a Federal question or U. S. constitutional question at all stages of the proceedings in the State courts but failed to do so.

1. No Federal question was ever raised or presented in the State courts in this action. Petitioner fails to cite any instance where a Federal question was presented in the State court proceedings as required by Supreme Court Rule 23(f). Supreme Court Rule 19(a) makes provision for the granting of a writ of certiorari "where a state court has decided a federal question of substance not theretofore determined by this court or has decided it in a way probably not in accordance with applicable decisions of this court." From the character of the reason indicated by this rule, it is quite apparent that a writ of certiorari should not be issued to a State court when no Federal question has been raised or decided in the State court. West's Federal Practice Manual Vol. 3, Section 3825. As stated by Mr. Chief Justice Hughes in *Lynch et al.* v. *People of New York,* 55 S. Ct. 16, l.c. 17, 293 U.S. 53, l.c. 54 (1934).

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that *it was actually decided* or that the judgment as rendered could not have been given without deciding it." (Emphasis supplied).

Petitioner devotes many pages of its argument to a discussion of the Agricultural Act of 1961, Public Law 87-128 (Title 7, U.S.C.A., Section 1926, and Title 42, U.S.C.A., Section 1492(b)(1)). Petitioner admits, however, that it was not even aware of the existence of these laws at the

time of the consideration of this litigation in the State courts (P. 7, Petitioner's Petition). This admission should be convincing proof that the question was never presented in the State courts. Respondents would respectfully remind the Court that the excerpt from a paper presented by the Administrator of the Farmers Home Administration, quoted on page 11, and the statistics quoted on page 12 of Petitioner's Petition as well as Petitioner's Appendices I and J and Petitioner's letter at Appendix A24 and A25 are not part of the record in this case.

2. The averment in the District's petition for injunction filed in the trial court alleging that the acts of the defendants were "in violation of the constitutional and statutory rights of plaintiff" (R 3) without setting out and pleading specifically the particular sections or articles of the U. S. Constitution claimed violated, was not sufficient pleading to raise any U. S. constitutional question for decision in the State courts.

State v. *Sappington*, 260 S.W.2d 669 (Mo. Sup. 1953).

Baker v. *Baker*, 274 S.W.2d 322 (Mo. App. 1954).

Petitioner does not cite a single instance of testimony being offered or evidence being presented in the State courts to support District's alleged contention that its U. S. constitutional rights had been violated. When the District's first appeal from the judgment of the trial court to the Missouri Supreme Court was challenged for lack of jurisdiction in the Supreme Court, and the Missouri Supreme Court transferred the appeal to the Kansas City Court of Appeals because the Supreme Court did not have jurisdiction of the appeal, no claim was made by the District or presented to the court that any constitutional question was involved in these proceedings. Had such constitutional question been shown, no transfer of the appeal would have been made by

the Supreme Court of Missouri to the Kansas City Court of Appeals. The Transfer of the appeal is reported in 388 S.W.2d 893.

3. Petitioner's belated attempt to raise for the first time a Federal question by incorporating the Federal question in its Petition for the Writ of Certiorari does not give this Court jurisdiction. The burden is on the Petitioner to show that the constitutional provision of Article VI of the U. S. Constitution and Section One of the Fourteenth Amendment to the U. S. Constitution and Section 306 of Public Laws 87-128 (Title 7, U.S.C.A., Section 1926 and Title 42, U.S.C.A., Section 1492) were raised by the District in either the State trial or appellate Courts. Petitioner's attempt to inject these issues by incorporating them for the first time in its petition for certiorari will not give this Court jurisdiction.

Hiawassee River Power Co. v. *Carolina Tennessee Power Co.*, 40 S. Ct. 330, 252 U.S. 341 (1920).

36 Corpus Juris Secundum, Section 274(2), p. 750.

4. The District's contention that the unanimous opinion of the Kansas City Court of Appeals in this case is in conflict with *Taylor* v. *Dimmit*, 78 S.W.2d 841, was overruled by both the Kansas City Court of Appeals and by the Supreme Court of Missouri as the facts in the two cases are easily distinguishable. Furthermore a conflict between State courts' decisions does not constitute grounds for a Writ of Certiorari by this Court where no Federal question is involved.

5. Respondents point out that the Petitioner had every opportunity to raise a Federal question at every stage of the state proceedings, but failed to do so. The significant point of all the pleadings and all of the evidence and all of the motions at all stages of the State court proceedings is

that no attempt was made to raise or preserve a Federal question or a U. S. constitutional question. As an afterthought of Petitioner's counsel, now for the first time, an attempt is made to inject into the proceedings certain provisions of the Agricultural Act of 1961, and certain sections of the U. S. Constitution, none of which was presented or considered by the State courts. The claim of "surprise" as proclaimed by Petitioner appears from its petition to be either inadvertence as to what the law is (p. 7, Petitioner's Petition) or some desperate attempt at this late stage of this controversy to gain relief when no such rights were preserved, nor were such rights ever in controversy in the State courts. Every opportunity was available to the plaintiff below in the State courts to present evidence on a Federal question or a U. S. constitutional question, but none was ever presented. Petitioner does not come within the principle of *Saunders* v. *Shaw*, 37 S. Ct. 638, 244 U.S. 317, cited by Petitioner, because Petitioner had every opportunity to raise its Federal or U. S. constitutional question in the State courts but of its own volition failed to do so.

Respondents cannot permit to go unchallenged Petitioner's misstatement that the testimony of Petitioner's witness, Mark Lucas, was not controverted (P. 6, Petitioner's Petition). In marked contrast to the testimony of witness Lucas, witness Bill T. Wall, Vice-President of a large investment banking house, testified that the service of water by Kansas City in the Crossgates Subdivision would not be harmful to the holders of the Water District's bonds (R 268, lines 17 et seq., R 269, 270, 271, lines 1-4). Both the trial court (R 269), (Finding of Fact No. 10) and the Appellate Court (408 S.W.2d 226, l.c. 231) upheld witness Wall's testimony.

CONCLUSION

For the foregoing reasons Respondents respectfully submit that the Writ of Certiorari petitioned for should be denied.

Respectfully submitted,

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